

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ADVANCE CABLE COMPANY, LLC and
PINEHURST COMMERCIAL INVESTMENTS, LLC,

Plaintiffs,

v.

THE CINCINNATI INSURANCE COMPANY,

Defendant.

OPINION & ORDER

13-cv-229-wmc

To settle its obligation and avoid the continued accrual of interest, The Cincinnati Insurance Company (“Cincinnati Insurance”) has filed the present, unopposed motion to deposit the final judgment amount in this case with the court under Federal Rule of Civil Procedure 67. (Dkt. #197.) For the reasons that follow, the court will grant that motion.

BACKGROUND

On July 15, 2014, the court entered judgment in this insurance dispute in favor of plaintiffs Advance Cable Company, LLC and Pinehurst Commercial Investments, LLC (collectively, “Advance Cable”) in the stipulated amount of \$175,500.00. (Dkt. ##177, 178.) Cincinnati Insurance then appealed the court’s earlier decision on coverage to the Seventh Circuit. Similarly, Advance Cable appealed the court’s decision to grant Cincinnati Insurance summary judgment on its claim of bad faith. On June 11, 2015, the Seventh Circuit affirmed the judgment in its entirety. *See Advance Cable Co. v. Cincinnati Ins. Co.*, 788 F.3d 743 (7th Cir. 2015).

While this suit is, therefore, essentially complete, two companion cases raising many of the same issues remain: *Welton Enterprises, Inc. v. Cincinnati Insurance Company*, No. 13-cv-

227-wmc, pending in this court; and *Hy Cite/Welton, LLC v. Cincinnati Insurance Company*, No. 13-CV-2123, pending in Dane County Circuit Court.¹

Following an unsuccessful attempt at mediating *Welton Enterprises* and *Hy Cite/Welton* in light of the Seventh Circuit decision in this case, Cincinnati Insurance now seeks to pay the judgment against it here to stop interest from running. (Def.'s Rule 67 Mot. (dkt. #197) ¶ 4.) Apparently, however, there are competing demands on the judgment preventing it from comfortably doing so.

In the present case, Anthony K. Murdock and Charles David Schmidt, of Halloin & Murdock, S.C., continue to represent Advance Cable. In *Welton Enterprises*, however, the plaintiffs executed a stipulation to substitute counsel on April 7, 2015 (dkt. #107), and are currently represented by Timothy Casper of Murphy Desmond S.C.

As counsel for Advance Cable, Schmidt sent Cincinnati Insurance's counsel an e-mail on June 12, 2015, asking that Cincinnati Insurance issue payment to Halloin & Murdock, S.C.'s trust account. (Mark W. Rattan Decl. Ex. A (dkt. #198-1).) Not quite a week later, on June 18, Schmidt also e-mailed Cincinnati Insurance's counsel a letter asserting an attorneys' lien of \$56,554.09 against all amounts recovered by or on behalf of the plaintiffs, citing Wis. Stat. §§ 757.36 and 757.37. (*Id.* at Ex. B (dkt. #198-2).) But that same day, Cincinnati Insurance's counsel, Mark Rattan, had a telephone conversation with Casper. In his declaration, Rattan indicates that Casper "informed [him] that he believed that Schmidt

¹ These cases are even more intertwined than their captions suggest. The record currently before this court includes a roof repair agreement executed when one of the plaintiffs here, Pinehurst Commercial Investments, sold the subject property to "Welton Family Limited Partnership," which apparently gives the ultimate owner of the Welton entities that are pursuing the other lawsuits a contractual right to recover the proceeds of this lawsuit from Advance Cable. (*See* Feb. 27, 2014 Mark W. Rattan Decl. Ex. C (dkt. #108-3).))

did not have authority to send out the June 18, 2015 letter.” (Mark W. Rattan Decl. (dkt. #198) ¶ 4.)

As a result, Cincinnati Insurance faces something of a dilemma. Halloin & Murdock asserts entitlement to \$56,554.09 of the judgment proceeds, but has yet to adjudicate the validity of that asserted lien. (Def.’s Rule 67 Mot. (dkt. #197) ¶ 9.) At the same time, current counsel for Welton, which apparently has a contractual right to Advance Cable’s interest in the proceeds of this suit, has already objected to Halloin & Murdock’s claim. (*Id.* at ¶¶ 8, 10.) Thus, Cincinnati Insurance is arguably left in legal limbo, unable to pay the judgment either to plaintiff’s counsel of record Halloin & Murdock or to plaintiffs directly without running some risk of incurring further liability (or at least, further litigation) should its decision prove incorrect.

OPINION

Rule 67 provides in part, “If any part of the relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party -- on notice to every other party and by leave of court -- may deposit with the court all or part of the money or thing, whether or not that party claims any of it.”² Fed. R. Civ. P. 67(a). “The core purpose of Rule 67 is to relieve a party who holds a contested fund from responsibility for disbursement of that fund among those claiming some entitlement thereto.” *Alstom Caribe, Inc. v. George P. Reintjes Co.*, 484 F.3d 106, 113 (1st Cir. 2007); *see also Zelaya/Capital Int’l Judgment, LLC v. Zelaya*, 769 F.3d 1296, 1302 (11th Cir. 2014); 13 James Wm. Moore *et al.*,

² Cincinnati Insurance has complied with the requirement that it notice every other party. Halloin & Murdock remains counsel of record for plaintiffs in this case and would have received a notice of electronic filing via the ECF system, and Cincinnati Insurance served a copy of the motion by mail on the Welton plaintiffs via their counsel at Murphy Desmond.

Moore's Federal Practice § 67.02 (3d ed. 2015). “[T]he dispute must be extant at the time the court is asked to grant the Rule 67 motion.” *Alstom Caribe*, 484 F.3d at 113. “Deposits into the court are commonly made in several situations,” including “when the deposit is in effect an offer or settlement or a tender of payment designed to stop the running of interest.” 13 *Moore's Federal Practice, supra*, at § 67.02 (footnotes omitted).

Based on the information before the court, there certainly appears to be “live” dispute. Cincinnati Insurance has received instructions to deposit the funds due on the judgment to the trust account of plaintiffs’ counsel of record, Halloin & Murdock, who also has formally asserted a lien on a portion of that claim, while the Welton plaintiffs’ present counsel has also informed it that Halloin & Murdock had no authority to make such a request.³ Thus, “the question of entitlement is genuinely in dispute,” *Alstom Caribe*, 484 F.3d at 113, and all the information before the court indicates that dispute is extant.

If it so wishes, Cincinnati Insurance should also be able to discharge any further obligation with respect to the disposition of the judgment funds. Cincinnati Insurance does not dispute it owes the judgment, stands ready to pay it and has no further role to play with respect to the apparent dispute between Advance Cable’s counsel and the Welton plaintiffs. *See Zelaya*, 769 F.3d at 1302 (affirming district court’s decision to allow deposit under Rule 67 where debtor was “ready and willing to pay the amount of the judgment” but “found himself ‘in a dilemma not of his own making’” due to competing claims); *Garrick v. Weaver*, 888 F.2d 687, 694 (10th Cir. 1989) (affirming magistrate’s decision to place settlement

³ Whether the dispute is “live” in the sense that there is a present dispute between the parties before this court is arguably a closer question, since the real dispute is apparently between plaintiffs’ counsel and one or more of the Welton entities. However, since Welton is at least arguably standing in plaintiffs’ shoes at this point (at least as it concerns payment of the judgment), the court is satisfied that a “live” dispute is before it in both general and specific legal senses.

funds in court registry pursuant to Rule 67; “His decision both ensured that the settlement fund would be available for disbursement and facilitated judicial economy by permitting the defendants, who no longer had an interest in the funds or in these proceedings, to withdraw.”); *U.S. Overseas Airlines, Inc. v. Compania Aerea Viajes Expresos de Venezuela, S.A.*, 161 F. sup. 513, 515-16 (S.D.N.Y. 1958) (authorizing Rule 67 deposit where, “although ready, willing and able to pay the judgment, the judgment debtors and their surety are in doubt as to whom it should be paid, simply because creditors of the judgment creditors are asserting conflicting claims thereto”).

In light of the above, and given the absence of any opposition from Advance Cable or the Welton plaintiffs, the court will, therefore, grant Cincinnati Insurance’s motion and permit deposit of all funds due under the judgment, including interest calculated pursuant to 28 U.S.C. § 1961(a) from the July 15, 2014, judgment until the date Cincinnati Insurance deposits those funds with the Clerk of Court. That act will discharge Cincinnati Insurance of any further obligation with respect to the judgment in this matter.

Having so ruled, there remains the question of what to do with the deposited sum. Counsel of record for plaintiffs in this case asked Cincinnati Insurance to pay it over to that law firm’s trust account, subject to its lien claim. That seems eminently reasonable. Having been put on notice that third-party Welton Family Limited Partnership or a related entity opposes that distribution, however, the court will give Welton thirty (30) days to intervene and brief why the court should not disburse these funds to the plaintiffs’ counsel as proposed.

ORDER

IT IS ORDERED that: (1) defendant The Cincinnati Insurance Company's motion to deposit payment of judgment with the court and for an order satisfying judgment (dkt. #197) is GRANTED; and (2) Welton shall have 30 days to move to intervene and show cause why the deposited funds should not be released to the trust account of plaintiffs' counsel of record.

Entered this 29th day of July, 2015.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge